United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-7402

ORIGINAL

To be argued by
JOHN P. D'AMBROSIO

In The

United States Court of Appeals

For The Second Circuit

KOOPERATIVA FORBUNDET, STOCKHOLM,

Plaintiff-Appellant,

- against -

VAASA LINE OY, PARTENREEDEREI M.S. "URSULA JACOB" and the SS URSULA JACOB, her engines, her boilers, etc.,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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KOOPERATIVA FORBUNDET, STOCKHOLM Plaintiff-Appellant - against - VAASA LINE OY, PARTENREEDEREI M.S. "URSULA JACOB" and the SS URSULA JACOB, her engines, her boilers, etc. Defendant-Appellee	Docket No. 75-7402

BRIEF FOR PLAINTIFF-APPELLANT

FACTS

In early June, 1973 the Plaintiff bought coffee from Anderson, Clayton & Company, S.A., a subsidiary of Anderson Clayton & Company, an American corporation whose American coffee division is located at 127 John Street, New York, New York in the Southern District of New York. Anderson Clayton filled its order by arranging for the shipment by its supplier, Cia. Continental S.A., in Costa Rica. In August, 1973, Continental shipped the coffee to the Plaintiff in Stockholm. The coffee was loaded aboard the vessel URSULA JACOB, sued herein in rem, at Puntaranes, Costa Rica, at which time Defendants Vaasa Line OY and Partenreederei, M.S. URSULA JACOB issued bills of lading numbers 1, 2 and 3. The bills of lading were clean and were certified "on board" by the master who also signed the bills of lading.

The shipper was Continental. Upon ultimate arrival at Stockholm the coffee was found severely damaged by water and some bags were slack. The coffee was surveyed at Stockholm on October 12, 1973 by surveyors representing both the Plaintiff and Defendants, having arrived there on October 7, 1973. At that time 125 bags out of bill of lading #1, 19 bags out of bill of lading #2 and 985 bags out of bill of lading #3 were found spotted with contents moldy. In addition, several bags were slack. The claim as ultimately formulated amounted to $59,828.45.

Payment to the shipper, Continental, was made as follows: Continental then had and still has its bank account in New York. Continental mailed the bills of lading and commercial invoices to Anderson Clayton & Co. at New York and upon their receipt Anderson Clayton arranged a remittance of funds to the credit of Continental at its New York bank. The documents were then forwarded to the Plaintiff in Stockholm to be exchanged for the coffee.

The Defendant, Vaasa Line is a Finnish corporation which runs a regular liner service to the U.S. The vessel, URSULA JACOB, was chartered to Vaasa Line at the time of the movement involved in this case. Vaasa Line ran a regular liner service to the U.S. at that time. Between March, 1973 and September, 1974 the URSULA JACOB made regular calls at U.S. West Coast ports, British Columbia and Honolulu.

The Defendant, Partenreederei M.S. URSULA JACOB, was a "single asset" corporation or partnership whose sole asset was the URSULA JACOB. The Plaintiff, Kooperativa Forbundet, Stockholm is the central organization of the Swedish consumer cooperative movement. It is an amalgam of various industries and trades in Sweden including soft and hard goods, food products, electrical equipment, pulp and paper, household goods and food stuffs. It has been actively engaged in business in the Southern District of New York for twenty-nine years. Between 1936 and 1973 it was located in New York City and since 1973 has been located in White Plains, New York. In addition to having an active sales office in White Plains and prior thereto in New York City where it employs a large staff, it is the sole owner of a subsidiary company, Products-From-Sweden, Inc., likewise located in the Southern District of New York for twenty-nine years and since 1973 at the White Plains address. The subsidiary is the purchasing and marketing arm for the Plaintiff and is in fact a New York corporation. Plaintiff's sales in the U.S. placed through the New York office amounted in 1974 to approximately five million dollars.

In May and June, 1974 a claim was formulated and presented to the Defendant, Vaasa Line by letter directed to its agent, Williams, Dimond & Co., San Francisco, California and to the Defendant, Partenreederei and the ship by trans-

mittal of the same claim to the vessel's P & I Club's representative in New York, Lamorte, Burns & Co., Inc., 1 World Trade Center, New York, New York. Both claims were acknowledged.

Plaintiff undertook the arrest of the vessel while it was in California in June, 1974. To forestall the arrest of the vessel at that time, the Defendant, Partenreederei, the vessel owner herein issued through its underwriter, the Steamship Mutual Underwriting Association Limited, a letter of undertaking in which Lamorte, Burns & Co., Inc., in this district, as attorney in fact for the said underwriter agreed to file an appearance on behalf of the owner, irrespective of the vessel not being in the jurisdiction at the time of the institution of suit without raising any question as to its absence from the jurisdiction, and to pay any decree entered or any lesser amount decreed by the Court or settled between the parties all in consideration of Plaintiff not arresting the vessel or attaching any funds of the owner, Partenreederei.

A complaint was filed in this Court on September 19, 1974 in this matter. Service was effected on the Defendant, Partenreederei, under Federal Rules of Civil Procedure 4I and personally on the Defendant, Vaasa Line OY by delivery of the summons and complaint to its agent in New York.

After the pre-trial conference called by the Court on January 17, 1975 the Defendant, Partenreederei, answered and made a motion to dismiss for forum non conveniens. A default judgment was entered pursuant to the order of this Court against the Defendant, Vaasa Line on February 7, 1975 for $64,952.22, which then moved to vacate.

STATEMENT ON THE MOTION TO DISMISS

The District Court relied on two broad grounds in granting the motion: a) that obtaining evidence here was less convenient than in any other forum where the suit could have been brought, and b) the bill-of-lading forum clause limited litigation to Finland. As a corrolary to a) the Court also found that the suit had no relevant contacts with this jurisdiction.

The Court ignored the in rem suit against the ship, apparently finding that since the suit was also in personam against the shipowner and charterer, that fact rendered the in rem action inconsequential. It is respectfully submitted that the Court was in error and abused its discretion in granting the motion.

It is Plaintiff-Appellant's contention that, as a matter of law the Court had no discretion concerning the in rem action but was obliged to retain it; and as a matter of fact it erred in dismissing the in personam suit, in large measure by relying on a basically invalid forum-selection clause.

POINT I

BURDEN OF PROOF

The burden on one seeking a transfer on grounds of forum non conveniens is a heavy one; as the Supreme Court stated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1946)

> "...The court will weigh relative advantages and obstacles to fair trial ***. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Beyond this general statement, the matter is entrusted to the discretion of the district court and precise guidelines are lacking. See Conte v. Flota Mercante del Estado, 1960 A.M.C. 1075, 277 F.(2d) 664, 667 (2 Cir., 1960). However, Foster v. United States Lines Co., 188 F.Supp. 389 (SDNY 1960) modified, 1964 A.M.C. 240, 227 F.Supp. 946 (SDNY 1961), make clear that the criteria to be considered in a forum non conveniens case are similar to those applied in a 28 U.S. Code, sec. 1404 (a) motion but that the burden on the moving party in the former case is even heavier." Ataka & Co., Ltd. v. S.S. San Patrick, 1965 A.M.C. 2576 (SDNY 65 AD 161)

The burden therefore on the Defendant in this case is much heavier. In Ataka (supra) the U.S. District Court for the Southern District of New York decided to retain a cargo damage case by Japanese shippers for loss of cargo enroute from Vancouver, British Columbia to Japan, even though no call was made at New York by the ship. In the case at bar the ship was actually in a liner service to the United States at the time of the loss in question.

Not only is the burden much heavier but the presumptions raised by an in rem action against a vessel are heavily in favor of the Plaintiff. In reversing the Lower Court, U.S. Court of Appeals, Fifth Circuit, in the case of Poseidon Schiffahrt v. M/S Netuno, 1973 A.M.C. 1180, 474 F.(2d) 203 (Mar. 1, 1973) retained jurisdiction and spoke of the Lower Court's holding as follows:

> "...Although it is undisputed that the district court had jurisdiction of the res, the court declined to exercise its jurisdiction because another suit between the same parties, involving the same issued, was pending in the admiralty courts of Canada, and also upon principles of forum non conveniens. The court accordingly dismissed the libel. The issue on appeal is whether the district court used the proper legal standard in declining to exercise jurisdiction. We hold that it did not, and therefore vacate the district court's order dismissing the libel and remand for further proceedings.
>
> The outcome of the appeal turns on the interpretation of the Supreme Court's decision in Belgenland, 114 U.S. 355 (1885). The jurisdictional issue there concerned a federal court's exercise of in rem jurisdiction arising from a collision on the high seas between two foreign vessels of different nationalities. The court stated the controlling principles:
>
> "(A)lthough the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris -- that is, where they arise under the common law of nations -- special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it.
> *******

"The subject has frequently been before our own admiralty courts of original jurisdiction, and there has been but one opinion expressed, namely: that they have jurisdiction in such cases and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it." Id., at 366-67.

"The standard for a federal court to use in determining whether to exercise its jurisdiction in an in rem libel involving foreign vessels of different nationalities, is, therefore that the court should exercise its jurisdiction unless the defendant can establish that to do so would work an injustice. Poseidon (supra).

POINT II

RULES TO BE APPLIED

It was perhaps best stated in an article by Bickel entitled Forum Non Conveniens in Admiralty, 35 Cornell L.Q.12, 27 (1949) that:

"...No rules to guide discretion have been formulated, and the cases, although the better ones point to and assist in the definition of standards, have not been lacking in confusion."

It would seem that some of the confusion has been dispelled by the U.S. District Court for the Southern District of New York in the Fluor Corp. v. S.S. President Co lidge, 70 Civ. 1232, 52 F.R.D. 538, 1972 A.M.C. 1365, 1366; there the Court held:

"The venue in admiralty matters is not limited by the rules relating to civil actions (Rule 82, Federal Rules of Civil Procedure). The general admiralty practice still prevails, permitting the venue of the suit in personam to be laid wherever the defendant can be validly served with process. See 1 Moore's Federal Practice

(2d ed.), Para. 0.144 (13.1). Although it is undoubted that the courts of admiralty have long had the power to reject jurisdiction as, for example, in the case where both plaintiff and defendant are foreigners, the general rule seems to be that courts of admiralty will take jurisdiction wherever the plaintiff chose the venue. The rule as to forum non conveniens, which applies in admiralty as well, was stated by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947):

"It is often said that the plaintiff may not, by choice of inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The movement of the vessel in that case involved the carriage of goods between Karachi, Pakistan and Los Angeles, California. It involved foreign corporations doing business in New York and the Court declined to dismiss the case for forum non conveniens.

Again, the U.S. District Court for the Eastern District of Virginia, in the case of Ching v. M/V Maratha Endeavor, 301 F.Supp. 809, 1968 A.M.C. 2689, denied a motion to dismiss involving a suit by a Hong Kong citizen on a British flag vessel registered at Nassau, manned by a Chinese crew, where treatment was in New York and the injury on the high seas. The Court again reiterating the rule that the burden is on the defendant to show why jurisdiction should not be retained, held quoting Belgenland, (supra):

> "...Special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged." (114 U.S. at 365).
> ****
> "...Where the parties are foreigners and the injury "takes place on the high seas, there seems to be no good reason why the party injured -- should ever be denied justice in our courts.' (114 U.S. at 368). The plaintiff, being a Chinese National, and the vessel owned by a British company, there is no home forum for the parties..."
> ****
> "...The action taken should be that which would 'preserve the rights of both parties." Langnes v. Green, 282 U.S. at 541, 1931 A.M.C. at 519.

As has been pointed out the case at bar has no home forum but only a forum of necessity which should not be disturbed.

Concerning this latter point, the Court held that if such were once true, it is no longer true. But in arriving at that conclusion the Court makes use of 20/20 hindsight. For it is precisely because of the actions of the Plaintiff in threatening the arrest of the vessel in the U.S., in suing the Defendants here, in investigating the case, in obtaining an agreement by the moving shipowner that it would not contest jurisdiction here if the ship were not arrested, that this forum in fact became the only forum where all parties and the ship could be brought together before the Court. Thus, the Court's observation that ...

> "It would appear that all parties cannot be joined in this jurisdiction for trial on the merits"

is inexplicable. It is absolutely unfair to Plaintiff, not Defendants (as suggested by the Court) that having gotten Defendants' attention after threatening the arrest of the ship, after entering a judgment against the charterer (Vaasa) at the order of the District Court, after, in fact, bringing all parties before this Court (the Defendant, Vaasa Line having voluntarily submitted to in personam jurisdiction) for the Court to now undo that effort and pick one of several possible alternative jurisdictions, in which the Plaintiff is required to start all over again. Defendants themselves suggested that Plaintiff could have sued either in Finland or Germany or Costa Rica. But at no time could Plaintiff have sued all the parties and the ship in rem in either of those jurisdictions; since the Defendant, Partenreederei never did business in Finland; Vaasa never did business in West Germany; and the ship never went near either place after the voyage in question. Where it did go was to the U.S. where the moving Defendant shipowner agreed to appear and defend.

Moreover, there is no assurance that Plaintiff will be permitted to present its case in Finland or that the Finnish Courts will observe Defendants' agreement not to raise the statute of limitations; and no assurance that the Finnish Courts will permit a bond on the same terms and conditions as the one Plaintiff has obtained here. Certainly Plaintiff's counsel who gathered the evidence and prepared this case

cannot represent Plaintiff there. All of the aforementioned factors prompted the U.S. Court of Appeals Fourth Circuit to reverse a dismissal in Gkiafis v. S.S. Yiosonas, 387 F.2d 460, 1967. In that case the Court of Appeals also laid great emphasis on the fact that the shipowner-defendant owned only one ship and that

> "When that ship entered Maryland, the respondent was doing all of its business there." Supra, p. 463.

The Court found such a fact a "contact" of great significance in its determination to reverse.

In the case at bar, precisely the same situation obtained. Partenreederei M.S. URSULA JACOB owned only the "URSULA JACOB" and it has since been sold. This leaves the Plaintiff with the distinct possibility of finding itself without a defendant or a bond or a viable lawsuit in Finland as has been pointed out above. Nor is it any consolation that it may come back here to resume prosecution of this action, although no provision has been made herein.

> "Whatever libellant gains by such an agreement is more than offset by the additional loss of time and expense he would have to bear." Gkiafis, supra, p. 464 footnote 10.

It is respectfully submitted, therefore, that this Court should conclude that there is no local interest to be served in this international litigation; Finnish or otherwise, other than the basic interest of the U.S. in exercising juris-

diction to avoid a failure of justice. (Dissenting opinion of Oakes, Circuit Judge, Fitzgerald v. Texaco, Inc., 2nd Circuit Docket Nos. 74-1958 and 74-1468 (not officially reported).

In the interests of justice the dismissal should be reversed.

POINT III

CRITERIA

Strictly from an in personam point of view the District Court held that this jurisdiction has no relevant contacts with the transaction. It is submitted that such is not the case. The coffee was purchased through a supplier doing business in New York. The Plaintiff has for twenty-nine years had an office in New York, payment was made in New York, the shipper had its bank account in New York, the Defendants had P & I representation in New York and Partenreederei issued its letter of undertaking in New York. The ship came to the U.S. West Coast. Witnesses as to loading would be in Costa Rica, eminently closer to New York than Finland. As indicated above, the Defendant Partenreederei owned only one ship. The Defendant Vaasa Line conducts a great deal of business in this country and operates a liner service to the U.S. West Coast. The motion was made five months after the complaint was filed. Plaintiff's remedy in Finland is at best uncertain. All of these factors are the real contacts which the Court should

consider to determine whether discretionary jurisdiction ought to be retained. The fact that there are foreign contacts is to be expected. That is the very nature of such international litigation. It is submitted, on balance, that considering the above factors, the Court abused its discretion. Gkiafis, supra.

The Court concluded that all of the available proof concerning damage was likely to be in Finland or Sweden. The Court was mistaken in that regard. The damages were ascertained by Plaintiff's surveyor and salvage effected by Plaintiff's salvor. Thus it is no problem for Plaintiff to bring those parties and that evidence to this Court and to make them available to Defendants. Moreover, the Defendants have not even touched on the question of damages or even intimated a defense. It should be noted that Defendants at no time identified a single witness whose convenience would be better served by a transfer of this case.

The Courts have taken cognizance of the changing times. Travel is swifter. As Judge Oakes observed in Fitzgerald, supra, the deposing of witnesses abroad or bringing them to the U.S. is simple today.

The crew is dispersed and witnesses as to loading are in Costa Rica. Thus, witnesses will be required to travel long distances wherever the case is tried. Ocean Sc. and Eng. v. International Geomarine Corp., 312 F.Supp. 825, 1971 A.M.C. 143, 148 and The Fluor Corporation, supra.

Finally, not without import in the case at bar is the fact that the shipments emanated from Costa Rica; manifestly closer to New York than to Scandinavia or the Continent; that the Plaintiff has an active office in New York where all the documents in connection with the shipment can be obtained and where an officer can testify; that the supplier has an office in New York and that the shipper transacted the payment through its New York bank, to say nothing of the fact that the owners of the URSULA JACOB, through their P & I Club, which has already undertaken to protect its interests, have investigated and have presumably all documents in their possession touching on the matter. In short, all parties and all documents and a great deal of the witnesses are already here.

It has also been held that

> "...Unless a defendant makes a clear cut showing that when all the interests are considered, trial would more conveniently proceed and the interests of justice would be better served in the other district, plaintiff's original choice of forum should not be disturbed." Pieser v. General Motors Corp., 158 F.Supp. 526, 529 (SDNY, 1958)

I submit that the Defendants have not even begun to make such a "clear cut showing".

The courts in this jurisdiction have consistently refused to dismiss actions of this nature on these grounds where the parties were in or have contact with New York. The plaintiff is clearly doing business here and the defendant, Partenreederi, M.S. URSULA JACOB, appeared here and its

underwriter issued a letter of guarantee here. Under these circumstances, it is submitted, the case belongs here.

POINT IV

THE BILL OF LADING "JURISDICTION" CLAUSE IS INVALID

The Court placed great reliance in its decision to dismiss this case on the bill of lading "jurisdiction" clause and found it prima facie valid and enforceable on the authority of Brennan v. Zapata Offshore Co. 407 U.S. 7.

It is submitted that on its face that forum selection clause is no agreement at all between the parties for several reasons. It is, in the first instance, extremely similar to the "Lilliputian" agreement held invalid in Lisi v. Alitalia 370 Fed.2d 515. In addition, it really is a contract of adhesion. The only choice which the shipper had was to ship or not ship. The clause was buried in boiler plate and the situation is not at all like that in Brennan, supra where the parties negotiated and renegotiated the entire agreement ending up with a forum selection clause which they freely chose.

That there is a basic inequality of bargaining power between the shipowner and the shipper has been recognized consistently. See for example, Gilmore and Black, The Law of Admiralty, 1957, page 125.

But more basic is the fact that the clause is simply vague. It speaks of "the principal place of business of the carrier". Initially, one would ask whose principal place of business is intended, the shipowner or the charterer, Finland or Germany, or, since the vessel was actually on a liner service to the United States at the time, is it the United States? This confusion seems to be not at all disspelled by the decision of the lower court since though the clause uses the term "carrier" which the court equates to the charterer, Vaasa Line Oy, the court found that it did not have to decide whether the shipowner, who brought the motion raising the jurisdiction clause as the basis for dismissal could actually avail itself of that clause; though in effect it did so.

What the court required the plaintiff to do was to locate and then construe a very vague clause difficult to find on the back of the bill of lading and then decide who was meant by the carrier and where that principal place of business, or as it turns out places of business, were located and then apparently start at least two in personam suits and, arrest the vessel in the United States. It is submitted that this is unfair.

The court in Indussa v. Ranborg 377 Fed.2d 200, although deciding to retain jurisdiction on other grounds held that the clause in and of itself was really invalid since it failed to identify within its four corners the forum to

which litigation was to be confined. This is the precise situation which obtains in this case and for this reason the clause similarly ought to fail.

It should be noted that in Zapata supra the court noted that the clause was a vital part of the contract since there were several bidders the contract was not a form agreement, did not contain boiler plate and Zapata had an opportunity to alter the agreement. The plaintiff in this case however, was faced with a take it or leave it situation and in fact offered a form bill of lading in the composition of which it took no part.

Even if found to be valid the clause is unenforceable, since, the action being at least in part in rem against the vessel, and the plaintiff having a right to expect that United States law apply would, if relegated to a foreign jurisdiction not know what a foreign court would do. See Indussa supra. Again, the proof is really easier to obtain here since the supplier is here, the loading port is nearer to New York than Finland and almost all the proof of damages can be supplied by the plaintiff. Moreover, while the plaintiff doesn't know what the foreign court might do or what law would apply or how it might be disadvantageous to it, it is submitted that Professors Gilmore and Black feel that the plaintiff doesn't really have to prove that fact, Admiralty, supra page 125, the rationale being that the mere fact that the

defendant seeks removal proves that it has something to gain. Gilmore and Black, supra, page 125, note 23. Moreover, it is submitted that the defendant, Vaasa Line Oy, uses the very same bill of lading in its shipments to United States ports in use in its liner service to the West Coast and must, therefore, find some advantage in such a clause.

It is also anomalous that while referring to a vague "principal place of business" the bill of lading does speak of United States law in several paragraphs including paragraph 4 which refers to sections 4281-4286 revised Statutes of the United States - The Fire Statute, paragraph 5, which refers to a package limitation in terms of $500.00 and paragraph 6 which couches general average in terms of U.S. law.

POINT V

THE "JURISDICTION" CLAUSE DOES NOT APPLY TO AN IN REM ACTION.

This action is in rem against the vessel. The jurisdiction clause is couched only in terms of in personam jurisdiction. That clause, paragraph 26 of the bill of lading is set forth fully in the lower court's opinion and speaks only of the "carrier". The clause immediately preceding it clause No. 25 speaks of both the carrier and the vessel:

> "25. TIME FOR SUIT. In any event the carrier and the vessel shall be discharged from all liability whatsoever in respect of the goods

unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered."

In Monrosa v. Carbon Black Export 69 S.Ct. 710 the very same situation obtained. The arrest of the vessel was threatened and a bond was given in lieu of arrest. The court held that the in rem action was not subject to the jurisdiction clause because it was couched in terms of in personam jurisdiction only. The court found:

> "The provision(the jurisdiction clause) in this case was one of many printed provisions in a form bill of lading prepared by the carrier and presented by it for use in shipments on its vessel."
>
> ***
>
> "We find ourselves in agreement with the views of the Court of Appeals below that this clause should not be read as limiting the maintenance of an action in rem, cf. Maggie Hammond 76 U.S. 435, 449-450 ..."
>
> "The initial words are particularly appropriate to a restriction of the clause to in personam actions and the rest of the language is intelligible on that premise."

The court noted that in another place of the bill of lading specific provision was made for both in rem and in personam suits. The court referred to the limitation of time clause similar to the one in the case at bar which limited suits against the "carrier and/or the ship to one year".

The court held that in accordance with the familiar rule in such circumstances it would not stretch the language when the party drafting such a form contract had not included a provision it easily might have.

So, in the case at bar, the bill of lading, drawn by one party and offered on a take it of leave it basis to the plaintiff could very well have provided that in rem suits be decided in some other definite jurisdiction if it wanted to. But it chose not to. It chose rather to talk about both the vessel and the carrier in another paragraph; it chose to describe the vessel elsewhere: in paragraph 8 of the bill of lading "Methods of Conveyance"; but it chose not to describe the vessel as such in the "jurisdiction" clause. It is respectfully suggested that the only conclusion that can be drawn from that omission is the same as drawn by the United States Supreme Court in Monrosa, supra, which is, that the in rem action cannot be dismissed and must remain for determination by this court.

It is extremely important to note at this time that the rationale of Monrosa, supra was specifically considered by the Supreme Court in Zapata, supra and held to be different, thus affirming Carbon Black and what is more pertinent is the entire rationale of the Fifth Circuit in Carbon Black 254 Fed. 2d 297. There the court in reversing a dismissal took the

language in that case "any claim against the carrier arising under this bill of lading", language identical in every detail with the clause in the instant case and held that there was nothing in the clause which had any tendency to establish that the parties intended that it should be made applicable to an in rem proceeding against the ship itself. The court quoted itself in Motor Distributors, Ltd. et al, v. Olaf Pedersen's Rederi 239 Fed.2d 463:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to oceangoing carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against the vessel, to proceed in rem in the jurisdiction where the vessel is found."

The Circuit Court in Carbon Black continued:

> "Finding no authority to the contrary and feeling that the exclusionary clause relied upon by the Respondents does not in terms apply to in rem proceedings. We hold that the court below was in error when it granted the motion to decline jurisdiction of the in rem feature of the libel."

The court noted that the defendant in that case posted a bond to release the Monrosa. The defendant in this case acted similarly. The court also considered that the plaintiff was a citizen of the United States, that the defendant operated a fleet of cargo ships to the United States, that the vessel was at the Port of Houston, that the bills of lading were printed in English, that a general appearance had been entered

on behalf of the Defendant, that the Plaintiff had chosen the forum and that its choice should be respected, that the testimony of the condition of the cargo when loaded and of the vessel at the time of loading was available only in the United States. Without belaboring the point each of those points is present in the case at bar: The Plaintiff does business in the Southern District of New York; the Defendant operates ships regularly to the West Coast; the URSULA JACOB came to the U.S. West Coast; the owner put in a general appearance; the Plaintiff chose the forum and the condition of the ship and the condition of the coffee on loading was available only in Costa Rica, so much closer to the United States than Finland.

Other cases similarly holding that a particular bill of lading clause couched in terms similar to the one at issue here cannot apply to an in rem action are Aetna Insurance v. Satrustegui, 174 F.Supp. 934 and Amicale Industries v. Rantum, 259 F.Supp. 534.

Finally, the Court in Monrosa, supra, considered the fact, which exists in the case at bar as well, that the Defendants pitched their arguments to a considerable extent upon the doctrine of forum non conveniens recognizing that the jurisdiction clause alone did not provide a firm basis upon which to stand. With that observation in mind, the Court quoted Gulf Oil Corp., supra, to the extent that

"...unless the balance is strongly in favor of

> the defendant the plaintiff's choice of forum should rarely be disturbed."

In conclusion, it is clear that the vast majority, if not every case in which an in rem suit against the vessel was involved ultimately refused to dismiss the action for forum non conveniens. It was perhaps best stated in a foot note in the case of Insurance Company of North America v. N.V. Stoomvaart, 201 F.Supp. 76:

> "Carbon Black cites with approval (254 F.2d 300) the universally recognized principle applicable to ocean going carriers which gives the right to libelant, possessing a maritime lien, to proceed in rem in the jurisdiction where the vessel is found. The Fifth Circuit points out that the principle itself is at stake on the issue of whether the court should retain jurisdiction when a bill of lading attempts to oust jurisdiction of an in rem libel."

POINT VI

TRANSFER OF SECURITY AND WAIVER OF DEFENSE OFFERS NO RELIEF TO PLAINTIFF.

In denying the motion to decline jurisdiction the Court in Sociadade Brasiliera v. SS Punta Del Este, 135 F. Supp. 394 held in language eminently applicable to this case, as follows:

> "Respondents also support their argument by agreeing to transfer the security they have deposited in this court to Uruguay and to waive any defense they may have under a statute of limitations. Thus, they assert libelant will not suffer "hardship" by a dismissal of the libel. That is not the point.

> What are to be applied in this case are the criteria included in the doctrine of forum non conveniens, (as distinguished from those applied under the transfer provisions of 28 U.S.C. 1404(a) see Norwood v. Kirkpatrick, 1955, 349 U.S. 29, 75 S.Ct. 544). Under that doctrine the important right of the plaintiff or libelant to choose as he pleases from among the possible sites of litigation is respected unless the defendant or respondent can show that he will be "unfairly prejudiced", Kloeckner Reederei Und Kohlenhandel v. A/S Hakedal, 2 Cir., 1954, 210 F.2d 754, 756, or it is found that "the balance is strongly in favor of the defendant," Gulf Oil Corp. v. Gilbert, 1947, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055. And since it will be no greater inconvenience for the respondents to bring to this court testimony of persons in Santos than it would be for libelant to take that of clerks in New Orleans or Montevideo, there is no "balance strongly in favor of the defendant" which would move the court to exercise its discretion in respondents' behalf.
>
> Therefore, the motion to decline jurisdiction will be denied and an order should be settled accordingly."

In conclusion it would appear clear that the Defendant is not serious concerning its jurisdiction clause since it uses it even on bills of lading covering shipments to and from the United States which as a matter of law renders it invalid and which, thus, could very well result in different determinations of losses which have a similar cause on the same voyage since one case might be decided in the United States and another elsewhere. Again, the Plaintiff simply

never agreed to the clause in question and in fact had no choice concerning it.

Finally, no case has dismissed an in rem complaint on such a boiler plate type clause.

POINT VII

THE DISTRICT COURT SHOULD BE REVERSED AND THE MOTION TO DISMISS DENIED.

STATEMENT ON THE MOTION TO VACATE

It is not known on what grounds the District Court relied in granting the motion to vacate. It simply announced before oral argument, that it would vacate the judgment: a judgment previously ordered by the same court under no different circumstances than obtained at the time of vacatur. No opinion was submitted.

This Court's attention is directed to the Facts as set forth in pages 1 - 5 of this Brief. In addition, it should be noted that on June 6, 1974 the Plaintiff submitted its detailed claim to the Defendant, Vaasa Line OY. By letter of June 19, 1974, Williams, Dimond & Co., Defendant, Vaasa Line's general agent in the United States forwarded the claim and supporting documents to Helsinki, Finland and directed that all correspondence be thereafter directed to the Defendant,

Vaasa Line at Helsinki. On June 26, 1974, Plaintiff's attorney wrote to Vaasa Line in Helsinki advising them of the claim, that an undertaking from the vessel in exchange for its not being arrested had been issued and requested similar letter of undertaking on behalf of the Defendant, Vaasa Line, and an extension of suit time. No response was forthcoming. Thereafter conversations with Lamorte, Burns & Co., Inc. on behalf of both Defendants took place on a regular basis between June 1974 and January 1975. A pre-trial conference was held in the District Court on January 17, 1975 and at the direction of the Court a letter on January 21, 1975 was directed to all Defendants advising them that they were to serve and file their answers no later than January 27, 1975, and that if answers were not filed, the Plaintiff might apply for the entry of a judgment by default. That letter was received by all Defendants prior to the entry of judgment. The Defendant, Partenreederei M.S. URSULA JACOB filed its answer. Defendant, Vaasa Line OY defaulted and a judgment was entered on February 18, 1975. Plaintiff then issued execution to the U.S. Marshal.

The Court totally overlooked and ignored the fact that no affidavit setting forth, a) excusable neglect, or b) a meritorious defense was submitted by defendant, Vaasa

Line Oy. Morevoer, it totally ignored the fact that not even defendant's lawyer could supply such necessary data. Under the circumstances it is respectfully submitted that the Court was in error and abused its discretion in vacating the judgment. It is Plaintiff-Appellant's contention that as a matter of law the Court had absolutely no grounds for vacating the judgment which the very same court previously ordered.

POINT VIII

RULES AND CRITERIA

It has been stated that where a default judgment is vacated there is an undercutting of prompt and efficient judicial administration, 1 Moore's Federal Practice (2d ed.) Section 55.10 (1). It has been held:

> "... The vacation of a default judgment duly entered without fraud or overreaching is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party." Ledwith v. Storkan (D. Neb. 1942) 2 FRD 539, 542, 544-545, 7 FR Serv. 60 b 24, Case 2.

Thus, the defendant who seeks to vacate a default judgment has no claim on the inclination toward indulgence on the part of the Court to which a Court may be prompted. Nor

should there be any in support of an indefensible sympathetic appraisal of the criteria which will be hereinafter stated. Ledwith, supra held:

> "... If the showing be inadequate fairly to establish such inadvertence or excusable neglect the simple, even if sometimes unpleasant duty of the court is to find accordingly and deny the relief sought."

POINT IX

BURDEN OF PROOF

Thus, the burden on the part of a defendant seeking to vacate a default judgment is extremely heavy and while the matter is really up to the sound discretion of the Court, it is not a situation where the vacation of the judgment is virtually an arbitrarily demandable right of the delinquent party, see Ledwith, supra. Thus, a movant on a motion of this nature has a heavy factual burden to sustain before the Court can even begin considering its application.

POINT X

PROOF REQUIRED ON THIS MOTION

A. EXCUSABLE NEGLECT:

A moving defendant must show on this motion that its default was either by mistake, inadvertence, surprise, or excusable neglect. The key word is excusable. The defendant in this case has shown none of these factors. The only reason ascribed for the default is that the defendant did not have sufficient notice of the proceeding. This is in no way

fleshed out and is a bald assertion which is immediately eliminated by defendant's counsel's own affidavit in stating that the letter sent to the defendant at the direction of the Court advising that judgment would be taken was received by that defendant in Helsinki eight days after its mailing by plaintiff's lawyer. We are not told when the letter sent to its general agent in California was received, but presumably some time before. In any event, that notice was received before judgment was entered and offers absolutely no basis for the relief demanded by the defendant, VAASA LINE herein. As a matter of fact, VAASA LINE was kept fully apprised of these proceedings since early June, 1974, as has been shown in my affidavit in opposition to this motion. Again, there is absolutely no showing of excusable neglect.

It has been held that such a showing is not only necessary, but that it must be done in more than a mere cursory fashion. It must be done in detail and it must not only show mistake, inadvertence or neglect but that such mistake, inadvertence or neglect was excusable. Here one does not even reach the first plateau since there is no mistake, inadvertence or excusable neglect since the only basis intimated by the defendant for its failure to respond is so promptly disspelled by its own admission that it <u>did</u> have sufficient notice of this proceeding. Moreover, no affidavit by Vaasa Line Oy was ever submitted -- an absolute necessity.

Ledwith v. Storkan supra is a case remarkably in point. There, a little over two months after a default judgment was entered the defendants moved to set aside the judgment. The Court, in a lengthy dissertation on this type of motion and the proof required and the presumptions underlying the matter, held as follows:

> "It is manifest that the facts here do not involve either mistake or surprise. If relief may be granted at all it must rest either upon 'inadvertence' or 'excusable neglect'....
>
> "... Save in those cases where the court has granted its indulgence without real study and as if the vacation of the judgment were virtually an arbitrarily demandable right of the delinquent party, there is no practical difference of opinion upon the point that neglect or inadvertence resulting in default will not alone justify the vacation of the ensuing judgment. The neglect or inadvertence must be excusable, and real and practical grounds for excuse must be factually shown in support of the motion.
>
> "Inevitably, the argument of the defendants must proceed to the point where they assert, that having employed counsel for the protection of their interests, they did all that could be expected of them and are entitled to absolution from responsibility for their attorney's negligence. But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client.
>
> "... Unless and until he shows that his default and the resultant judgment are attributable to his 'mistake, inadvertence, surprise or excusable neglect', the rule

> invoked confers no authority upon the Court to vacate the judgment and allow him to answer. In the absence of such showing, the judgment must stand regardless of any inclination towards indulgence, to which the court may be prompted."

It is submitted, that the absence in this case has been so complete and so glaring that the judgment must stand regardless of any inclination toward indulgence which the District Court may have had. To do otherwise would fly in the face of established law and be absolutely unfair to this plaintiff.

Of course, the matter is at the discretion of the Court, but that discretion has been circumscribed by certain limits which have been set forth in several cases. Ledwith supra continued to hold:

> "Even when he makes the showing required by the rule, his claim to relief is not absolute. He merely invokes then, and by that showing, the exercise by the court of a sound judicial discretion as to whether the vacation solicited should be allowed. It is true, that upon adequate showing, the court's discretion should ordinarily incline towards granting rather than denying relief, especially if it be manifest that no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue. And the reported decisions under the rule reflect the pursuit of that practice.
>
> "But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an

> indefensibly sympathetic appraisal of an attempted showing of 'inadvertence or excusable neglect'. If the showing be inadequate fairly to establish such 'inadvertence or excusable neglect', the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought."

Although there have been no facts presented for the excuse of the defense association or counsel for the defendant and thus no mention really has to be made, this Court should consider how such defenses have been viewed by other judges. Thus:

> "In Canup v. Mississippi Valley Barge Line Co., Inc. (WD Pa. 1962) 31 FRD 282, 283-84, 6 FR Serv. 2d 55c.1, Case 1, Judge Dumbold made the following observations:
>
> "The bar must realize, and we declare it as emphatically as we can, that these dates fixed by law, rule, or court order mean something. They are not empty formalities. To neglect or ignore a date for action in a court proceeding is in reality a thinly-veiled species of disrespect or contempt for the court.
>
> "In the case at bar, while this is the first [default] experienced by this member of the court with respect to the particular individual lawyer involved, we find that the firm involved is one that is a well established Pittsburgh firm with an extensive practice in federal courts. If their practice is too extensive to handle it properly, the remedy is either to hire more lawyers or advise clients to seek representation elsewhere."

Plaintiff subscribes very strongly to Judge Dumbold's observation. It can't conceive of a reason why VAASA LINE did not answer in this case and why it waited two months

after the judgment was entered to bring on this motion. It firmly believes that it was done only when the moment of truth arrived and its assets were going to be executed against. The Supreme Court of the United States has also shown its concern for the dates and rules fixed by law as meaning something. The late Supreme Court Justice Robert H. Jackson in his opinion in Knickerbocker Printing Corp. v. United States, 75 S. Ct. 212, at 213 held that if rules of practice mean anything they should be observed. He said:

> "... When more business becomes concentrated in one firm than it can handle, it has two obvious remedies: to put on more legal help or to let some of the business go to offices which have time to attend to it. I doubt if any court should be a party to encouraging the accumulation of more business in one law office than it can attend to in due time."

Although that excuse has not been tendered by the defendant's lawyer it must be lurking somewhere in the background when reference is made to the failure of counsel and defendant's defense association to comply with this Court's directive. Accordingly, defendant's excuse is no excuse at all and offers him no grounds for relief.

Finally, in a case remarkably in point Port-Wide Container Company vs. Interstate Maintenance Corporation 440 F.2d 1195, the Third Circuit in April, 1971 affirmed the denial of the District Court to vacate a default judg-

ment, where over a period of many months after the filing of the complaint there were many oral and some written communications between counsel for the parties with a view to settlement; and after the long continued futile efforts to achieve a settlement plaintiff's attorney wrote to the defendant's attorney asking that an answer be filed by a specific date and that if such an answer was not filed a default would be entered; the complaint having been filed six months prior to that letter. The court held, that even though the letter was not received by defendant's lawyer due to his secretary's fault, that circumstances did not make it inequitable for plaintiff's attorney, who had properly given notice of his intention, to proceed in accordance with the rules governing default.

The court ended:

> "[2] The district judge did consider the fact that defense counsel never received the quoted letter but concluded that in all of the circumstances of this case it was not inequitable or unduly harsh to permit the default judgment to stand. We have examined all of the evidentiary matter submitted by the parties to the district court. We find no abuse of discretion in the action of the court. Nothing in the record indicates that the judgment as entered was a harsh or excessive award.
>
> "The judgment will be affirmed."

In the case at bar the letter was admittedly received by the defendant. More reason for the denial of the motion.

B. MERITORIOUS DEFENSE:

The second part of the rule in order to enable defendant to succeed on this motion is that it must show a meritorious defense. This defense cannot be shown merely in a conclusory fashion or by bald allegations with no support in fact. Plaintiff submits that the factual showing on a motion of this nature is such as is required on a motion to defeat summary judgment, and asks that the cases hereinafter cited be read in conjunction with its original Memorandum in Oppostion to Co-defendant's Motion and in support of plaintiff's motion for summary judgment. Without belaboring the point, there has been absolutely no showing or even mention of any facts relating to a defense of this action. Again, the only mention of the matter is made in the words of defendant's counsel in that he believes that the defendant VAASA LINE has a good and substantial defense. This is wholly inadequate. Morevoer, it has been held that where a court had no more than mere allegations that a defense existed, that alone was sufficient to deny Rule 60 (b) relief, Gomes v. Williams 420 F.2d 1364. In the Gomes case the Circuit Court for the Tenth Circuit in 1970 sustained the District Court's denial of a motion where the District Court stated that the defendant failed to "furnish facts showing that he has a meritorious defense" and "failed to establish that he has a good excuse for failure to appear", and "that

there are no grounds of mistake, inadvertence, excusable neglect or any other reason which would justify the court in setting aside the default judgment". The court held:

> "... The preferred disposition of any case is upon its merits and not by default judgment. Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963). However, this judicial preference is counterbalanced by considerations of social goals, justice and expediency a weighing process which lies largely within the domain of the trial judge's discretion. Thus, the trial court ought not reopen a default judgment simply because a request is made by the defaulting party; rather, that party must show that there was good reason for the default and that he has a meritorious defense to the action. Regarding the latter, the only statement made by Gomes' attorney was the following: 'We do have a good defense to the claim itself, but especially we have a good defense to any allegation of fraud.' Such a bald allegation, without the support of facts underlying the defense, will not sustain the burden of the defaulting party under Rule 60 (b). In an attempt to determine the meritorious nature of a defense, the trial court must have before it more than mere allegations that a defense exists. This alone was sufficient basis to deny Rule 60 (b) relief." Gomes supra 1366.

It should be noted how parallel the facts in Gomes are to the facts in our case. The bald allegation by VAASA's attorney that he "believes" not that he really knows, but believes that defendant VAASA LINE has a good and substantial defense, is as unavailing to his defendant as was Gomes' lawyer's statement. Again, it should be noted that this court again stated that it ought not to reopen a default judgment simply because a request is made by the defaulting

party. Much, much more is required, none of which has been offered in this case.

The rationale again is clear. If no defense is available, then the parties are merely running around in circles to the detriment of all concerned.

The holdings of the courts in this regard have been unanimous. The defaulting party must show that there is a factual or legal basis for the tendered defense. Madsen v. Bumb (CA9th, 1969) 419 F2d 4, 13, FR Serv 2d 55c.1, Case 1; Consolidated Masonry & Fireproofing, Inc. v. Wagman Const. Corp. 383 F. 2d 249; Robinson v. Bantam Books, Inc. (S NY 1970) 49 FRD 139, 14 FR Serv. 2d 384

C. PREJUDICE TO THE PLAINTIFF:

Vacating the judgment herein has prejudiced plaintiff, since, doing all that was required of it by the court, expending time, effort and money in entering the judgment, expending more time, effort and money in executing, it has now, by the vacatur, lost its judgment and money and faces the added expense of reprosecuting anew an action which, from all one can tell from defendant's proffered position will be in no better posture at the time of trial on defendant's part than it is now, and will result in the same judgment.

D. DELAY:

Not only was no excuse offered for the original default; there is absolutely no reason shown by the defendant to this Court as to why it took ten months after the defendant knew of the claim, seven months after it was sued, and two months after the judgment was entered, for it to make this motion. For that delay alone the motion should be denied. See Ledwith supra.

POINT XI

CONDITIONS.

In granting a motion to vacate the district court may impose reasonable conditions, Thorpe v. Thorpe 364 F.2d 692.

The court should have conditioned its vacatur upon the payment by defendant of reasonable expenses incurred by the plaintiff in the prosecution of the case, the entry of judgment and in opposing the motion.

If this Court adheres to the decision below, an imposition of costs and attorneys fees would not be unfair in view of the great work involved and imposed on plaintiff and its counsel.

In True Blood vs. Grayson Shops of Tennessee, Inc. (E.D. Va., 1962) 32 FRD 190, the court conditioned the

opening of the default on the payment of costs and attorney's fees of $2,000.00.

POINT XII

SUMMARY JUDGMENT

Both defendants submitted to the jurisdiction of this Court. Neither ever offered any scintilla of evidence which could possibly offer them a defense to plaintiff's claim. Therefore, for the reasons set forth in plaintiff's affidavits and memoranda the court should grant plaintiff summary judgment, plaintiff's motion for which the district court never considered.

POINT XIII

THE DISTRICT COURT SHOULD BE REVERSED AND THE MOTION TO VACATE DENIED.

The motion should be denied. Movant has not sustained its burden of proof. It has not shown any excuse for the default. It has not shown any meritorious defense. Great prejudice would be visited on the plaintiff if the motion is granted and the delay in making the motion itself ought to dictate its denial. A meritorious defense is a necessity, Koen v. Beardsly (CCA10th, 1933) 63 F2d 595; York Land Co. v. Leonard (CC ED Ark, 1885) 24 Fed. 660; see Williams v. Blitz (CA 4th, 1955) 226 F2d 463, 22 FR Serv. 55c.2, Case 1; United States v. Edgewater Dyeing Co. (ED Pa. 1957) 25 FR Serv. 55b.1, 21 FRD 304. A detailed, factual showing of a defense is a necessity. (Cases cited)

Where, as here, the default is due to willfullness, the defendant in default has no right to seek a vacation of the judgment. Michigan Window Cleaning Co. vs. Martino (CA 6th, 1949) 173 F2d 466; Ledwith v. Strokan supra.

Respectfully submitted,

JOHN P. D'AMBROSIO, P.C.
The Honeywell Center
570 Taxter Road
Elmsford, New York 10523

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KOOPERATIVA FORBUNDET, STOCKHOLM, **Plaintiff-Appellant,** *- against -* **VAASA LINE OY, ETC., Defendant-Appellee.**	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 24th *day of* October *1975 at* 1) Haight Gardner Poor & Havens, 1 State Street Plaza, N.Y., N.Y. 2) Cinchanowicz & Callan, 80 Broad Street, N.Y., N.Y. *upon*

deponent served the annexed Brief

the Attorneys *in this action by delivering* 2 *true copy* (ies) *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 24th *day of* October *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1976